

THE HIGH COURT

COMMERCIAL

[2011 No. 1521 S]

[2011 No. 72 COM]

BETWEEN

EBS BUILDING SOCIETY

PLAINTIFF

AND

THOMAS (OTHERWISE TOM) HEFFERON AND MICHAEL KEARNS

DEFENDANTS

JUDGMENT of Mr. Justice Brian J. McGovern delivered on the 2nd day of October 2012

1. In this application, the defendants seek an order discharging the order of the High Court made on 13th March, 2012, on foot of the ex parte application of the plaintiff, in which Mr. Tom Kavanagh of Kavanagh Fennell Chartered Accountants was appointed as receiver by way of equitable execution over:-

(a) The Tom Hefferon Pension Fund described in the Deed dated 3rd January, 2007, made between NDMG Limited of the one part, the first named defendant and Jean Hefferon as company trustees and Alan Flynn of BDO Simpson Xavier Financial Services Limited of the other part.

(b) The Michael Kearns Pension Fund described in the Deed dated 4th July, 2006, made between NDMG Properties Limited of the one part, the second named defendant and Margaret Kearns as company trustees and Alan Flynn of BDO Simpson Xavier Financial Services Limited of the other part.

2. Both funds have been approved by the Revenue Commissioners as exempt approved pension schemes under s. 774 of the Taxes Consolidation Act 1997. The defendants seek to set aside the appointment of the receiver on two grounds, namely:-

(i) material non-disclosure on the part of the plaintiff in the ex parte application to the High Court on 13th March, 2012, for the appointment of a receiver by way of equitable execution; and

(ii) that neither the capital funds held in the Pension Scheme nor any payments made therefrom in the future to the defendants are amenable to attachment by way of appointment of a receiver by way of equitable execution over the said Pension Schemes.

3. The following is a chronology of events which are relevant to the application:-

- On 4th July, 2006, by Deed made between NDMG Properties Limited of the one part and Michael Kearns and Margaret Kearns and Alan Flynn of the other part, the Michael Kearns Pension Fund was established.
- By letter of 11th July, 2006, the Revenue Commissioners approved the Michael Kearns Pension Fund as a Retirement Benefits Scheme for the purposes of Part 30, Chapter 1, of the Taxes Consolidation Act 1997.
- On 3rd January, 2007, by Deed made between NDMG Properties Limited of the one part and Tom Hefferon, Jean Hefferon and Alan Flynn of the other part, the Tom Hefferon Pension Fund was established.
- By letter of 13th February, 2007, the Revenue Commissioners approved the Tom Hefferon Pension Fund as a Retirement Benefits Scheme for the purposes of Part 30, Chapter 1 of the Taxes Consolidation Act 1997.
- On 9th May, 2011, by consent, the High Court gave judgment against the defendants in favour of the plaintiff in the sum of €7,231,891.59 together with costs in the sum of €167.
- Following the making of the order on 9th May, 2011, the plaintiff registered judgment mortgages over some nine properties belonging to the defendants including each of the defendant's family homes.
- On 17th May, 2011, the plaintiff obtained a European Enforcement Order against the defendants on foot of the aforesaid judgment.
- By letter dated 8th July, 2011, in response to a letter of 15th June, 2011, from the solicitors for the plaintiff, the solicitors for the defendants advised that the defendants were both members of an Occupational Pension Scheme sponsored by their employer. No further inquiries were raised by the solicitors for the plaintiff in relation to the said Pension Schemes.
- On 27th July, 2011, the plaintiff obtained an order of attachment of shares against the defendants on an ex parte basis.
- On 21st September, 2011, the plaintiff appointed Mr. Ken Fennell of Kavanagh Fennell Chartered Accountants as receiver of property at 12 Camden Row, Dublin 8 owned by the defendants.

- On 20th December, 2011, the plaintiff obtained an order for discovery in aid of execution against the defendants.
- By supplemental deeds dated 15th February, 2012, and as permitted and provided for by Clause 15 of the defendants' Trust Deeds, the "Normal Retirement Age" as defined in Schedule 1 of each deed was amended to the 70th birthday of a member.
- The supplemental deeds, duly executed by the Principal Employer, the defendants and their respective wives and Mr. Alan Flynn, Pensioner Trustee, were executed on foot of agreement reached on 31st January, 2012 and 15th February, 2012.
- On 17th February, 2012, the defendants swore affidavits of discovery in aid of execution on foot of the order of 20th December, 2011.
- On 6th March, 2012, the plaintiff issued Circuit Court proceedings against the defendants and their spouses seeking, inter alia, a well-charging order, and an order for sale in respect of their family homes.
- On 13th March, 2012, on ex parte basis, the High Court made an order appointing Tom Kavanagh of Kavanagh Fennell Chartered Accountants as receiver by way of equitable execution over the Tom Hefferon Pension Fund and the Michael Kearns Pension Fund and gave liberty to the defendants to apply to vary or discharge the said order.

4. In addition to the defendant's application to set aside the appointment of the receiver, separate motions have been brought by the defendants' spouses.

Allegation of Material Non-Disclosure by the Plaintiff in ex parte Application.

5. The ex parte application for the appointment of a receiver by way of equitable execution was made on foot of an affidavit sworn by Mr. Philip Butler on 9th March, 2012. In para. 9 of his affidavit he states that in relation to the defendants' pension funds "... there had been serious non disclosure on the part of each of the defendants in the original statement of affairs". In para. 13 of his affidavit he states:-

"The said pension funds, which were both assets of very substantial value, were not referred to at any point in the estimated statements of affairs provided to the plaintiff under oath in June 2011. ... The existence of the defendants' pensions was excluded from statements of affairs prepared in June 2011, notwithstanding the fact that the plaintiff's solicitors (by letter dated the 20th May, 2011, to Eversheds, the defendants' solicitors) called upon each of the defendants to provide inter alia:-

'... a detailed Schedule of all assets held by him wherever such assets may be situate in the world (including but not limited to all real and personal property) in which he has any legal or beneficial interest (whether held in his own name, in partnership with others or in a joint venture with others through companies or through any form of trust) over which he has any form of control or to which he has any form of contractual or other entitlement wherever such assets may be in the world ... "

6. At the conclusion of para. 13 he states, "It seems highly unlikely to me that the defendants could not have advertently (sic) excluded their pensions from their statement of affairs. No explanation whatsoever has been offered by the defendants for why their pensions were excluded from their original statement of affairs".

7. The defendants complain that in his affidavit granting the ex parte application, Mr. Butler omitted to exhibit or refer to a letter written by the solicitors for the defendants to the solicitors for the plaintiff on 8th July, 2011, which stated *inter alia*:-

"Our clients are both members of an Occupational Pension Scheme sponsored by their employer. Following receipt of this letter, the solicitors for the plaintiff wrote to the solicitors for the defendants in relation to various matters, but did not pursue the issue of the pensions until the plaintiff's application for discovery in aid of execution. In the course of his affidavit sworn on 6th December, 2011, grounding that application, Mr. Butler acknowledged receipt of the letter of 8th July, 2011, but complained that the information had been presented in a 'vague and uninformative manner'."

8. The affidavit of discovery in aid of execution sworn by each of the defendants referred to the relevant pensions. The defendants' affidavits were sworn on 17th February, 2012. The defendants complained that Mr. Butler's affidavit on the ex parte application to appoint a receiver by way of equitable execution suggests that in omitting to refer to the pension funds in the estimated statements of affairs exhibited in the affidavits of 17th June, 2011, the existence of the pension funds was being kept hidden from the plaintiff who was unaware of the existence of same until receipt of the affidavits of discovery in aid of execution sworn on 17th February, 2012.

9. It is clear that on 8th July, 2011, the defendants' solicitors wrote to the plaintiffs solicitors informing them "our clients are both members of an Occupational Pension Scheme sponsored by their employer". It also appears to be the case that before Mr. Butler swore his affidavit on 9th March, 2012, the plaintiff was fully aware of the existence of the pensions. The defendants argue that the plaintiff ought to have informed the High Court on the making of the ex parte application of the letter of 8th July, 2011. Not only did the plaintiff fail to do so, but accused the defendants of having sought to conceal this information. In the circumstances the defendants state that this is a material non-disclosure and one which would significantly influence any court in the course of hearing an application for ex parte relief. Accordingly, the court should exercise its discretion in discharging the order of 13th March, 2012, whereby the receiver by way of equitable execution was appointed.

Duty of uberrima fides in making ex parte Applications

10. An application made ex parte must be made *uberrima fides* that is to say with the utmost good faith. In *Tate Access Floors Inc. v. Boswell* [1991] 2 W.L.R. 304, Browne-Wilkinson V.C. stated at 319:-

"No rule is better established, and few more important, than the rule, 'the golden rule' that a plaintiff applying for ex parte relief must disclose to the court all matters relevant to the exercise of the court's discretion whether or not to grant relief before giving the defendant an opportunity to be heard. If that duty is not observed by the plaintiffs, the court will discharge the ex parte order and may, to mark his displeasure, refuse the plaintiff further inter partes relief even though the circumstances would otherwise justify the grant of such relief"

11. Full disclosure of all facts relevant to the application must be made even where such facts may militate against the granting of an interim order. In *F.McK. v. D.C.* [2006] IEHC 185, Clarke J. stated at para. 2.2 that the obligation to make full disclosure was "... a

quid pro quo for the entitlement of the applicant to obtain what are, frequently, very onerous orders, without affording the person affected by those orders an opportunity to be heard."

12. In *Brink's Mat Ltd v. Elcombe* [1988] 1 W.L.R. 1350, Ralph Gibson L.J. at 1356 listed seven principles relevant to the duty of full disclosure on an *ex parte* application:-

"In considering whether there has been relevant non-disclosure and what consequence the court should attach to any failure to comply with the duty to make full and frank disclosure, the principles relevant to the issue in these appeals appear to me to include the following:-

(1) The duty of the applicant is to make 'a full and fair disclosure of all the material facts: ' ...

(2) The material facts are those which it is material for the judge to know in dealing with the application as made: materiality is to be decided by the court and not by the assessment of the applicant or his legal advisers ...

(3) The applicant must make proper inquiries before making the application ... the duty of disclosure therefore applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made such inquiries.

(4) The extent of the inquiries which will be held to be proper, and therefore necessary, must depend on all the circumstances of the case including:

(a) the nature of the case which the applicant is making when he makes the application; and

(b) the order for which application is made and the probable effect of the order on the defendant; ... and,

(c) the degree of legitimate urgency and the time available for the making of inquiries ...

(5) If material non-disclosure is established, the court will be 'astute to ensure that a plaintiff who obtains [an ex parte injunction} without full disclosure ... is deprived of any advantage he may have derived by that breach of duty: ...

(6) Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to the issues which were to be decided by the judge on the application. The answer to the question whether the non disclosure was innocent, in the sense that the fact was not known to the applicant or that its relevance was not perceived, is an important consideration, but not decisive by reason of the duty on the applicant to make all proper inquiries and to give careful consideration to the case being presented.

(7) Finally, it 'is not for every omission that the injunction will be automatically discharged. A locus poenitentiae may sometimes be afforded: ' ... the court has a discretion notwithstanding proof of material non-disclosure which justifies or requires the immediate discharge of the ex parte order, nevertheless to continue the order, or to make a new order on terms."

13. In *Brennan v. Lockyer* [1932] I.R. 100, Kennedy C.J. stated at 108 that an affidavit which does not fully recite the relevant facts but avers as a fact what is really a conclusion of fact *"is not such an honest disclosure of facts as the court should act upon"*. In *Atkin v. Moran* [1871] I.R.6 E.Q. 79 Lord O'Hagan L.C. stated that the party making the application is not to make himself the judge of whether a particular fact is material or not. If it is a fact that might in any way affect the mind of the court, it is the duty of the applicant to bring it before the court's attention having effective non-disclosure.

14. In *Bambrick v. Coble* [2005] IEHC 43, [2006] I.L.R.M. 81, Clarke J. stated that the court had discretion to refuse to grant interlocutory injunction sought and to discharge the already granted interim injunction if there was material non-disclosure. He said at 89 that the court should have regard to all the circumstances of the case and he then set out a number of factors which appeared to him to be the ones most likely to weigh heavily with the court in exercising its discretion namely:-

"1. The materiality of the facts not disclosed

2. The extent to which it may said the plaintiff is culpable in respect of a failure to disclose. A deliberate misleading of the court is likely to weigh more heavily in favour of the discretion being exercised against the continuance of an injunction than an innocent omission. There are obviously intermediate cases where the court may not be satisfied that there was a deliberate attempt to mislead but that the plaintiff was nonetheless, significantly culpable in failing to disclose.

3. The overall circumstances of the case which lead to the application in the first place."

15. In *Kanwell Developments Ltd v. Salthill Properties* (In receivership) [2008] IEHC 3, Clarke J. identified at para. 5.4 a further consideration in the exercise of the court's discretion:-

"It is important to emphasise that the obligation of candour lies on any party making an ex parte application to the court, irrespective of the nature of the order which might be made in the event that the ex parte application was successful. However, it does seem to me that amongst the factors which the court should properly take into account in deciding what to do about any non disclosure, is the extent to which the order sought on the ex parte application might be regarded, on the one hand, as largely procedural or, on the other hand, as affecting rights and obligations. Where a third party (not before the court) has their rights and obligations altered on an application made ex parte, then the court should be even more anxious to ensure that the party who obtains the benefit of the order has made proper disclosure."

16. For the reasons I have already outlined, the defendants claim that there was a material non-disclosure by the plaintiff in making the *ex parte* application in that the deponent sought to convey the impression that the defendants were concealing the existence of a pension fund when this was not the case and at a time when the plaintiff already had detailed particulars of the nature of the

pension fund of which each of the defendants were members.

17. The plaintiff argues that the authorities relied on by the defendants are primarily concerned with the interlocutory applications where the court is making an onerous order before a final determination has been made and not to processes of execution which are intended to allow enforcement. The plaintiff points out that in *F.McK. v. D.C.* [2006] IEHC 185, Clarke J. at para. 3.4 of his judgment indicated that he had considered "... decisions such as *Brinks-Matt Limited v. Elcomb* [1988] 3 All E.R. 188, which without discounting the heavy duty of candour which falls upon persons making *ex parte* applications, cautions against the principle of disclosure being carried to extreme lengths".

18. The plaintiff argues that the letter of 8th July, 2011, from the defendants informing the plaintiff that the defendants were both members of an Occupational Pension Scheme sponsored by their employer had not significant information content other than to admit the existence of assets of some unstated worth and without some degree of explanation as to whether it meant that it was within the materiality levels and that it was left to the plaintiff to make of it what it could. However, it appears that the plaintiff did not seek further information from the defendants once this information had been disclosed. The plaintiff points out that the affidavit of the first defendant stated that documents in relation to the defendants' pensions were "*prima facie relevant to the issue of whether the defendants have any and what other property or means to satisfy the plaintiff's judgment*".

19. Before stating my conclusions on this issue I will deal with the second point raised by the defendants.

Are the capital funds held in the Pensions Schemes or any payments made therefrom in the future to the defendants amenable to attachment by way of the appointment of a receiver by way of equitable execution over the said Pension Schemes?

20. Section 772 of the Taxes Consolidation Act 1997 ("the Act of 1997") provides, *inter alia*, as follows:-

"(1) Subject to this section, the Revenue Commissioners shall approve any retirement benefits scheme for the purposes of this Chapter if it satisfies all of the prescribed conditions, namely-

(a) the conditions set out in subsection (2), and

(b) the conditions as respects benefits set out in subsection (3).

(2) The conditions referred to in subsection (1) (a) are-

(a) that the scheme is bonafide established for the sole purpose of providing relevant benefits in respect of service as an employee, being benefits payable to, or to the widow or widower, children or dependants or personal representatives of, the employee;

(3) The conditions as respects benefits referred to in subsection (1) (b) are -

(a) that any benefit for an employee is a pension on retirement at a specified age not earlier than 60 years and not later than 70 years, or on earlier retirement through incapacity, which does not exceed one-sixtieth of the employee's final remuneration for each year of service up to a maximum of 40 years;

(f) that no pension is capable in whole or in part of surrender, commutation or assignment, except in so far as the scheme allows an employee on retirement to obtain by commutation of the employee's pension a lump sum or sums not exceeding in all three-eightieths of the employee's final remuneration for each year of service up to a maximum of 40 years;

..."

21. Section 774 of the Taxes Consolidation Act 1997 provides, *inter alia*, as follows:-

"(1) This section shall apply as respects-

(a) any approved scheme shown to the satisfaction of the Revenue Commissioners to be established under irrevocable trusts, or

(b) any other approved scheme as respects which the Revenue Commissioners, having regard to any special circumstances, direct that this section shall apply,

and any scheme which is for the time being within paragraph (a) or (b) is in this Chapter referred to as an 'exempt approved scheme'."

22. This section goes on to make provision for tax relief on the income of and contributions made to an approved scheme.

The Pension Deeds

23. The terms of the two Pension Deeds are similar. In each case the Deed is between the principal employer, one of the defendants and his spouse as "*the Company Trustees*" and Alan Flynn as "*the Pensioner Trustee*". Each of the Pension Funds was established by Deed on the dates already referred to at para. 3 of this judgment.

24. The Deeds recite that the principal employer has determined to establish under irrevocable trusts, a Retirement Benefit Scheme which is capable of being approved by the Revenue Commissioners pursuant to s. 772 of the Act of 1997 and capable of being treated by the Revenue as an exempt approved scheme pursuant to s. 774 of the Act.

25. In order to determine whether the capital funds held in the Pension Schemes or any payments to be made thereunder in the future are amenable to attachment by way of appointment of a receiver by way of equitable execution over the Pension Schemes, it is necessary to look at some relevant clauses of the Deeds.

26. Clause 1:-

"The principal employer establishes the Scheme under irrevocable trust to commence on and operate from [1st January, 2007 in the case of Thomas Hefferon, and 4th July, 2006 in the case of Michael Kearns]".

Clause 2:-

"The principal employer appoints the Trustees to be Trustees hereof and in respect of the Scheme and the Trustees consent to so act".

Clause 3:-

"The Trustees undertake to carry out the obligations of the administrator under the Act and to comply with the requirements of the Pensions Act 1990 and all Regulations made thereunder".

Clause 5:-

"The Trustee shall seek approval of the Scheme by the Revenue Commissioners as an exempt approved scheme under s. 774 of the Taxes Consolidation Act 1997 and shall do all acts and things necessary to ensure the continuation of such approval.

Clause 6:-

"The purpose of the Scheme is the provision of relevant benefits as defined in the Act for persons entitled to participate in accordance with the provisions hereof and for the dependents of such persons.

Clause 8:-

"(a) the Scheme is intended to be approved by the Revenue Commissioners as an exempt approved Scheme in accordance with s. 774 of the Act (as hereinbefore defined) and the Trustees agree to act and are hereby appointed as administrator (as hereinbefore defined) to manage and administer the Scheme in a manner consistent with the requirement of such approval.

(b) This Scheme is an Occupational Pension Scheme as defined by s. 2(1) of the Pensions Act 1990, and this Deed and Rules shall be construed subject to the provisions of the said Act and any other Act of the Oireachtas relating to Occupational Pension Schemes and any Regulation made thereunder."

Clause 12:-

"The Trustees subject to the proviso contained in clause 14, shall have all powers necessary or convenient to the proper discharge of the duties imposed on them by this Deed and the Rules of the Revenue Commissioners and by the Pensions Act 1990 and to the efficient functioning of the Scheme and shall exercise such powers in lawful manner which they think fit. They may accept donations and bequests as part of the funds. A Trustee (or any member of the board of directors of a body corporate which is a Trustee of the Scheme) who is or has been a beneficiary of the Scheme shall be entitled to retain for himself any benefit to which he is entitled by virtue thereof"

Clause 14:-

"The Trustees may delegate any of their functions including the signing of cheques and the issue of receipts to any two of their number or in the case of a body corporate acting as sole Trustee to any two of its directors or a director and secretary PROVIDED ALWAYS THAT the Pensioner Trustees shall consent to all financial transactions on the fund and shall be a co-signatory and all bank accounts comprising part of the Fund."

Clause 15:-

"The provisions of this Trust Deed and the Rules may be amended from time to time by supplemental Deed executed by the Principal Employer and the Trustees provided that no such amendment shall:-

(a) permit the payment of monies or other benefit from the Scheme in any circumstances to the Principal Employer or any other Associated Employer or the transfer of any investments or any of the property of the Scheme or any of them; or

(b) alter the main purpose of this Scheme as described in clause 6 hereof"

27. The following are some relevant rules of the Deeds:-

(a) "Normal Retirement Age" is defined in each Deed as meaning "the sixtieth birthday of a member";

(b) "Member" is defined in each Deed as meaning "a person who is currently included in the Scheme in accordance with the eligibility conditions set out in Schedule 2 hereof;

(c) Rule 2.1 of each Deed provides "a permanent employee of any of the Employers shall be eligible for inclusion in the Scheme at the absolute discretion of the Principal Employer".

(d) Rule 3.1 provides "the amount and form of benefits payable to a member and/or his dependents are always subject to the limits and regulations set out in Schedule 4 and may be varied if necessary to comply with the provisions of Schedule 4 or with any amendment thereto".

(e) Rule 3.2 provides "a member's interest in the Fund shall be determined by the Trustees having regard to the value at that time of investments held by the Trustees on his behalf referable to the employer's contributions and employee contributions (if any) on its behalf any transfer payments received by the Trustees in the name of the member."

(f) Rule 3.3. provides "on the retirement of a member at Normal Retirement Age (or such earlier or later date of retirement as the member and Trustees determine subject to the continued approval of the Scheme by the Revenue Commissioners under the Act), his interest in the Fund shall be applied to the provision of pension for the member and/or his dependents in a manner to be agreed between the member and Trustees and acceptable to the Revenue Commissioners".

(g) Rule 5.5 provides "benefits from this scheme may not be assigned to or charged in favour of any person and any purported assignment or charge shall be invalid but shall divest the beneficiary of any interest in the benefits purported to be assigned or charged except insofar as the Trustees shall decide".

28. On 11th July, 2006, the Revenue Commissioners approved the Michael Kearns Pension Fund as a Retirement Benefit Scheme for the purpose of Part 30, Ch. 1 of the Act of 1997. By letter dated 13th February, 2007, they approved the Tom Hefferon Pension Fund on a similar basis. On 28th February, 2012 and 6th June, 2012, Deeds of Amendment were executed in respect of the Thomas Hefferon Pension Scheme and Michael Kearns Pension Scheme respectively and the Deeds of Amendment were dated 15th February, 2012, to reflect the decision to make the amendment on that date. "Normal retirement date" was thereby changed to mean "the 70th birthday of a member". Mr. Thomas Hefferon will be 70 on 20th August, 2019, and Mr. Michael Kearns will be 70 on 14th June, 2018. Under the current terms of the Pension Fund Deeds, neither of the defendants have a legal or beneficial ownership in respect of the assets held within the Pension Fund until they reach the age of 70. This arises on account of the provisions of Rule 3.2 which provides that "a member's interest in the Fund shall be determined by the trustees". On their retirement, the defendants' interest in the Fund shall be applied to the provision of pension for the defendants and/or their dependents in a manner to be agreed between the defendants and the trustees and acceptable to the Revenue Commissioners. So even after the defendants reach "normal retirement age", their right to receive a pension is subject to the agreement of the trustees. Although the Pension Fund is clearly intended to benefit each of the defendants, the Deeds provide at Rule 2.1 that a permanent employee of any of the employers shall be eligible for inclusion in the scheme at the absolute discretion of the principal employer, and the defendants argue that, therefore, the composition of the Pension Funds as of the date of normal retirement age is not certain. Neither of the defendants have withdrawn any funds or otherwise received the benefit of any monies created in the Fund and Mr. Alan Flynn, the pensioner trustee for both pension funds confirms that no benefits of any kind, save for his own remuneration, have ever been paid out of either pension fund.

29. The appointment of a receiver by way of equitable execution is a discretionary remedy. Property which is intended to be the subject of the receivership may be either legal or equitable in nature, but it must be capable of assignment and not otherwise inalienable. See Lafferty and Jarvis in 'Commercial Enforcement' (2nd Ed. 2008) at para. 6.30. This principle is repeated in Glanville in 'Enforcement of Judgments' (1999 Round Hall Sweet & Maxwell) at para. 16-12. In *Hannibal v. Cunningham* [2006] IEHC 326, [2010] 2 I.R. 1, Laffoy J. stated at para. 30 that the remedy of appointment of receiver by way of equitable execution is a remedy only available where the judgment debtor has only an equitable interest in the property against which the judgment creditor seeks recourse. In so holding, she applied *National Irish Bank Ltd. v. Graham* [1994] 1 I.R. 215, in which the jurisdiction of appointment of a receiver by way of equitable execution was considered.

30. The court was referred to Picarda in 'The Law Relating to Receivers, Managers and Administrators' (4th Ed. 2006, Tottel Publishing) where, at p. 403, the author states, "the court must, in the first place and in any event, be satisfied that the property in question is capable of assignment". The defendants argue that equity does not act in vain, and where it cannot be shown that the appointment of a receiver by way of equitable execution will be an effectual and useful method of enforcing the judgment, that it will not be made.

31. The defendants cited a number of texts and some case law in support of the proposition that a receiver can only be appointed over pension payments where the pension is awarded entirely for past and not all for future services and is assignable.

32. In *Lucas v. Harris* [1887] 18 Q.B.D. 127, the English Court of Appeal held that where a statutory pension was expressly made inalienable by the voluntary act of the person entitled to it and even though the entitlement derives only from past services, the pension cannot be taken in execution and an order appointing a receiver in such situation is not permissible.

33. In *Garahan v. Garahan* [1959] I.R. 168, Dixon J. declined to follow that authority and said that he did not see why public policy required that the pension of a member of An Garda Síochána should be wholly incapable of being touched or attached if he incurs liabilities which cannot be met except by resort to the pension. It seems to me that the facts of that case are distinguishable from the circumstances that arise here. In this case, both of the defendants are continuing to work for the principal employer, and as such, any pension payments that may become payable thereon and in the future cannot be regarded as awarded solely for past services at the time of the application for the appointment of the receiver by way of equitable execution. No pension payments are presently being made on foot of either Pension Fund. Rule 55 of the Deed provides an express contractual prohibition on the assignment of benefits from the Pension Funds, a restriction which is consistent with a necessary condition of an approved Pension Scheme as prescribed by s. 772(3)(f) of the Act of 1997. Each Deed, in accordance with s. 774(1) of the Act of 1997, has created an irrevocable trust.

34. In *Field v. Field* [2003] 1 Fam. 376, the court held that a contractual restriction on assignability which is binding on a judgment debtor would be fatal to equitable execution.

35. In *Blight v. Brewster* [2012] EWHC 165, G. Moss Q.C., sitting as a deputy High Court judge, considered that the reasoning in *Field v. Field* on the receivership issue was flawed and should not be followed, and noted that the decision was criticised in the decision of the Privy Council in *Tasarruf Mevduatı Sigorta Fonu v. Merrill Lynch Bank and Trust Company (Cayman) Ltd.* [2011] UKPC 17, [2012] 1 W.L.R. 1721, [2011] 4 All E.R. 704. The plaintiff claims that the judgment in *Masri v. Consolidated Contractors International (UK) Ltd.* (No. 2) [2008] EWCA Civ 303, [2009] 2 W.L.R. 621, represents an important evolution in the judicial approach to execution, and specifically receivers, by way of equitable execution. In the course of his judgment, at paras. 183 and 184, Lawrence Collins L.J. stated:

"The court confirmed, ... that the demands of justice must always be the overriding consideration in considering the scope of the jurisdiction under section 37(1), in particular to make orders to render any other order of the court effective: ...

In my judgment there is no reason why in 2008 the court should not exercise a power to appoint a receiver by way of equitable execution over future receipts from a defined asset. There is no longer a rule, if there ever was one, that an order can only be made in relation to property which is presently amenable to legal execution. There is no firm foundation in authority for a rule that the remedy is not available in relation to future debts. There is no principle which

prevents the development of existing authority to extend the remedy to the property which was the subject of the receivership order in this case."

36. The matter was further considered by the Privy Council decision of *Tasarruf Mevduatı Sigorta Fonu v. Merrill Lynch Bank and Trust Company (Cayman) Ltd.* [2011] UKPC 17, [2012] 1 W.L.R. 1721, [2011] 4 All E.R. 704. In that case, a Turkish entity had obtained a substantial judgment against the defendant, Mr. Demirel. Mr. Demirel had established a discretionary trust in the Cayman Islands with substantial assets, and the objects of the trust were his wife, his children and remoter issue with a charity as a residuary legatee. The power to revoke the trust had been reserved by Mr. Demirel. The court said that there was no impediment to it making an order that the defendant should delegate his powers of revocation to the receivers so they could exercise them and the court could make an ancillary mandatory order. The court took the view that the powers of revocation were such that, in equity, the defendant, Mr. Demirel, could be regarded as having rights tantamount to ownership.

37. The defendants argue that the present case can be distinguished with those decisions relied on by the plaintiff, in that the Pension Funds have established an irrevocable trust for the purpose of providing retirement benefits, and they were established in accordance the provisions of s. 772 and s. 774 of the Act of 1997, which provides a statutory framework and conditions for the provision of exempt approved schemes of the type created by the Deeds. The Deeds themselves provide for a prohibition on the assignment of the benefits from each of the pension funds and unlike some of the cases relied on by the plaintiff, neither of the defendants has an interest currently capable of being attached by way of equitable execution as they have had no interest either legal or beneficial in the capital funds and not power to secure the payment of capital funds held under the irrevocable trust. Furthermore, even if the court were to hold that there exists an interest capable of having a receiver appointed over it, such a receiver could only step into the shoes of the respective defendants, and under the terms of the Deed, the defendants have no expectation of obtaining a pension until the age of 70, and that therefore the appointment of a receiver would be futile.

38. Submissions were also made on behalf of the spouses of the defendants.

39. The spouses made applications to the court by notice of motion for the following orders:-

(i) An order setting aside the appointment of the receiver by way of equitable execution;

(ii) In the alternative, an order varying the order of the High Court made on 13th March, 2012, on such terms so as not to afford any degree of priority to any interests that may be deemed by the court to have become vested in the EBS Building Society in respect of the two pensions funds ahead of the interests of the spouses in the respective pension funds;

(iii) Alternatively, for an order varying the High Court order of 13th March, 2012, on such terms so as not to permit any interest that may be deemed by the court to have become vested in the EBS Building Society in respect of the two pension funds to be realised and/or dealt with and/or disposed of by the EBS Building Society in any way that would be detrimental to the interests of the spouses in the respective pension funds.

40. The spouses do not have any liability to the plaintiff in respect of the order of the Commercial Court dated 9th May, 2011, in the sum of €7,231,891.59. They apprehend that if the order appointing the receiver by way of equitable execution was to stand, the receiver could deal with the funds without having regard to the potential interest of the spouses.

41. In their submissions, the spouses raise similar points to those raised by the defendants. But they also make some further points which are particular to their situation.

42. As the word "dependent" is not defined in the Deeds establishing the pension funds, they rely on the Revenue Commissioners Manual which sets out the Revenue practice in the area of pensions. This stipulates that a dependent means:

"A person who is financially dependent on an employee, or was so dependent at the time of the employee's death or retirement. A relative who is not, or was not, supported by the employee is not his dependent.

But a child of the employee may always be regarded as a dependent until he reaches the age of 18 or ceases to receive fulltime education or vocational training, if later."

The spouses also argue that if one spouse is financially dependent on the other spouse, it appears that that spouse would come within the definition of a "dependent". Each of the spouses have sworn affidavits in which they have stated that they are financially dependent on their spouse named as a defendant in the proceedings. Mr. Philip Butler, in an affidavit sworn on behalf of the plaintiff, asserts that the spouses have no entitlement whatsoever under the Pension Deeds but may, with the consent and choice of the respective defendants be given such an interest upon the actual retirement of the respective defendants. He states that the Deed does not confer a right on the spouse but that a right is conferred on each of the defendants to benefit certain other parties other than themselves at their election alone.

43. Rule 3.3 of the Deeds provides that on retirement of a member at normal retirement age, the member and the trustees determine, subject to the continued approval of the Scheme by the Revenue Commissioners under the Act, his interest in the fund shall be applied to the provision of a pension to the member and/or his dependents in a manner to be agreed between the member and trustees and acceptable to the Revenue Commissioners. This seems to be at variance with the averment of Mr. Butler who suggests that the member can act unilaterally or that he personally enjoys the benefit of the interest. It is inconsistent with the wording of Rule 3.3. Even the member's interest in the fund shall be determined by the trustees. The Trust is a discretionary Trust. The spouses rely on the decision of Carroll J. in *Crowe Engineering Ltd. v. Lynch* [1992] 2 Fam. L.J. 45, which is authority for the proposition that a court will not per se interfere with the trustees' exercise of their discretion in schemes which is similar to the ones at issue in this case and will do so only if there is evidence of bad faith on the part of the trustees in the exercise of that discretion.

44. The plaintiff argues that "dependent" limits the persons who can receive a benefit under the Trust but does not necessarily confer any benefits. The Pensioner Trustee has no right or entitlement to take any view in relation to an entitlement on their part, save with the agreement of the member. It is the member's interest which is being disposed of and there is no obligation to confer any particular benefit on any particular dependent.

45. The plaintiff submits that what is provided for the defendants is not a right to be considered at all but a right on the part of the member to divest himself of a portion of the interest which holds in his pension fund and which he can, at his election, dispose of to any of his dependants and not merely his spouse. I do not accept that the interests of the dependents are not something to be

considered. It is a question of the weight to be given to their interest having regard to the terms of the Deed and all the surrounding circumstances.

46. I cannot ignore the fact that the spouses have deposed to the fact that they are entirely financially dependent on the defendants and that dependency would include (to some extent) an interest in the pension fund. It cannot be said that merely because they have not made contributions to the pension fund, they have no interest in it as a dependent. If that were so, many dependents currently enjoying the benefit of a pension fund would be precluded from such schemes. I take the view that the spouses do have an interest, albeit a contingent interest, in the fund and that it is a matter which can be taken into account in deciding the issue before me.

Conclusion

47. I now come to my decision on the two issues which arise in this hearing, namely, the allegation of material non-disclosure by the plaintiff in the ex parte application, and the question as to whether the capital funds held in the pension schemes or any payments made therefrom in the future are amenable to attachment by way of appointment of a receiver by way of equitable execution?

48. When Mr. Philip Butler asserted in his affidavit sworn on 9th March, 2012, that there had been "... *serious non-disclosure on the part of each of the defendants in the original statement of affairs* ..." he was partially correct. Undoubtedly, the matter was not disclosed in the statement of affairs but whether this was a "*serious non disclosure*" is another matter. It seems to me that there were reasons why the pension funds were not included and that these were adequately explained in the cause of this hearing. The Deeds establishing the pension funds have set up an irrevocable Trust for the purpose of providing retirement benefits which had been established in accordance with the provisions of sections 772 and 774 of the Act of 1997. The Deeds themselves provide for a prohibition on the assignment of benefits of each of the pension funds. While it is possible for lawyers to argue as to whether the funds should have been included in the statement of affairs, it is quite clear from the correspondence that as soon as the question was raised in correspondence, the defendants immediately made known to the plaintiff the existence of the pension funds. Furthermore, the plaintiff sought no further details of the pension schemes at that time. It seems to me that in those circumstances, the characterisation of the failure to include the pension funds in the statement of affairs as a "*serious non disclosure*" is unfair and represents less than the full picture at the time when the ex parte application was brought. This could only have been prejudicial to the defendants and would have weighed on the mind of the judge hearing the ex parte application, particularly in view of the fact that Mr. Butler added gratuitously at para. 13 that, "*it seems highly unlikely to me that the defendants could not have advertently (sic) excluded their pensions from their statements of affairs*". Having regard to the actual state of knowledge of the plaintiff at the time when Mr. Butler's affidavit was sworn, these assertions were, at the very least, misleading. They were calculated to influence the court in the making of the order sought.

49. Applying the principles that emerge from the jurisprudence already referred to in this judgment, it seems to me appropriate in this case to discharge the order made appointing the receiver by way of equitable execution on that ground alone.

50. However, I will now also give my conclusions on the other question.

51. On the question as to whether or not the benefits from the pension funds are amenable to attachment by way of appointment of a receiver by way of equitable execution, there is a conflict in the arguments raised by the plaintiff and the defendants (including their spouses). The defendants argue that in England and Wales, the jurisprudence has evolved in recent years to the point where it is possible for the court to appoint a receiver by way of equitable execution over future receipts since the decisions in *Masri v. Consolidated Contractors International (UK) Ltd. (No. 2)* and *Tasarruf Mevduati Sigorta Fonu v. Merrill Lynch Bank and Trust Company (Cayman) Ltd.* (the "*TMSF*" case already referred to above). In the *Masri* case, the court held that the remedy of appointment of a receiver by way of equitable execution was discretionary and that a receiver can be appointed in respect of future debts or income from a defined asset. Of some significance, this was not a case involving a pension or a case involving an irrevocable trust. The defined asset in that case was future oil revenue. In the *TMSF* case, a receiver by way of equitable execution was sought to be appointed over the proceeds of two discretionary trusts in the Cayman Islands where the party executing the trusts had reserved the power to revoke, amend, vary or alter the trust. The Privy Council held that the powers of revocation were such that in equity in the circumstances of that case, the party entitled to exercise the power of revocation could be regarded as having rights tantamount to ownership. In the circumstances, the court directed that the holder of the power of revocation should delegate his powers to the receiver so they could exercise them. The only discretion that the holder of the power had was whether to exercise it in his own favour. In the course of his judgment, the Privy Council noted that no serious suggestion had been made on behalf of the holder of the power that there would be any prejudice to any third party. It seems to me that the facts of both these cases are quite different to the matter which I have to decide. Under the terms of the Pension Fund Deeds, neither of the defendants have a legal or beneficial ownership in respect of the assets held within the pension fund until they reach the age of 70 years. Even after they reach that age, their right to receive a pension is subject to the agreement of the trustees and the pension funds have established an irrevocable trust for the purpose of providing retirement benefits and were established in accordance with the provisions of sections 772 and 774 of the Act of 1997. This provides a statutory framework and conditions for the provision of exempt approved schemes. The Deeds provide for a prohibition on the assignment of benefits from each of the pension funds. They are approved schemes "*shown to the satisfaction of the Revenue Commissioners to be established under irrevocable trust*" (s. 774 of the Taxes Consolidation Act 1997). In my view the pension funds of the defendants are not amenable to attachment by way of appointment of a receiver by way of equitable execution.

52. The defendants are entitled to an order in the terms of para. 1 of the notice of motion dated 28th May, 2012. In the circumstances, it is not necessary to make any order in respect of the motion brought on behalf of the spouses of the respective defendants.