Neutral Citation Number: [2007] IEHC 79

THE HIGH COURT

Record Number: 2003 No. 508 JR

BETWEEN

COLLETTE O'CONNELL

APPLICANT

AND
AN BORD PLEANALA

RESPONDENT

AND
DUNGARVAN TOWN COUNCIL, LAVINE LIMITED, SHANE HOULIHAN, PROINNSIAS BREATHNACH AND AN TAISCE

NOTICE PARTIES

Judgment of Mr Justice Michael Peart delivered on the 19th day of February 2007

1. The second named Notice Party, Lavine Limited, seeks an order appointing a Receiver by way of Equitable Execution over so much of any monies which the applicant might in the future recover by way of damages in an action which she has commenced in the High Court arising out of an assault upon her in the past, as may be sufficient to satisfy an unsatisfied judgment for costs obtained by it against the unsuccessful applicant in the above proceedings.

2. The second named Notice Party obtained that order for costs, and interest thereon against the applicant in these proceedings on the 31st July 2003. These costs have been taxed in the sum of €58,315.47, and it has been calculated that interest on that sum up to the 1st October 2006 amounts to €15,315.47, making a total sum for costs and interest to the said date of €73,477.49. This sum remains unsatisfied by the unsuccessful applicant in these proceedings.

3. This Court made an order on the 11th December 2006 on a conditional basis appointing a Receiver by way of Equitable Execution, and gave liberty to serve Notice of Motion upon the applicant to make that order absolute.

4. The applicant has appeared on that motion and has filed a replying affidavit in which she refers to the proceedings commenced by her in which she is claiming damages for assault arising from an incident in May 1999. On that occasion, according to her affidavit, she was "viciously assaulted" by the defendant in those proceedings. The Court has been informed by her Counsel that the pleadings have been closed but that the case has not yet been set down for trial.

5. She goes on to state that following the making of the costs order in the present case, she instructed her solicitors to try and negotiate an agreement with the second named Notice Party in order to enable her to proceed with her action for damages, but that no such agreement has been possible. She goes on to state that she has instructed her present solicitor that she was prepared to give an undertaking to the second named Notice Party that upon the successful conclusion/settlement of her action against her alleged assailant her said solicitors would pay to it 75% of whatever damages were awarded or negotiated, in partial or complete discharge of the said costs order. This offer has not been accepted.

6. Finally she avers that the effect of any order appointing a Receiver by way of Equitable Execution may well be to exempt the defendant to her proceedings from any liability for the serious injuries which he caused to her and to "thwart justice being done", and that this Court should not allow its procedures to be used in order to facilitate that. Her Counsel has clarified what that might mean, and has stated that if the order is made as sought herein, she will be obliged to put her solicitor in funds in advance of that case being heard so that his fees and those of Counsel and medical personnel can be covered, since any damages and costs which she may recover will be caught by the terms of the order appointing a Receiver over same. However, given that the Court has a discretion as to the terms in which any such order may be made, perhaps so as to exclude from its ambit such costs as might be recovered on a party and party basis, I take the submission to mean also that the sum for any damages awarded would not be available to cover any shortfall between those party and party costs and any solicitor/client costs payable.

Submissions

7. This application is brought in the first place under the provisions of O.45, r.9 RSC which provides as follows;

> "(9) In every case in which an application is made for the appointment of a receiver by way of equitable execution, the Court in determining whether it is *just or convenient* that such appointment should be made shall have regard to the amount of the debt claimed by the applicant, to the amount which may probably be obtained by the receiver, and 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. The order shall be made upon such terms as the Court may direct."

8. Micheál O'Connor BL has submitted that this Court has no power to make the order sought over a sum of money which is not yet ascertained as to amount and which may become available in the future. He submits that this application is therefore premature since the action which might yield an amount of damages is not yet heard, and that in the future, should the applicant be successful in those proceedings, the second named Notice Party will have the normal remedies available to it so as to execute against her in respect of any such award.

9. In support of the submission that this Court cannot appoint a Receiver over any future amount of money to which the applicant may be entitled, Mr O'Connor has referred to *O'Floinn: Practice and Procedure in the Superior Courts* at page 356, where in a footnote to O.45, r.9 RSC the learned author notes:

> "A receiver will not generally be appointed over payments to be made in futuro but only over payments which have accrued but have yet to be paid over to a defendant."

10. The authorities referenced for that statement are *Re: Johnson* [1898] 2 IR 551 and *Ahern v. O'Brien* [1991] 1 IR 421.

11. In the latter case – a case in fact relied upon by the second named Notice Party - a conditional order was made over the defendant's interest in certain ground rents payable into the future to the defendant and another co-owner on foot of certain leases. That order was made absolute in due course, but the defendant did not appear on the application to make absolute and therefore no contrary arguments were put forward. But O'Hanlon J. when ruling on the *ex parte* application for the conditional order, stated at p. 422:

> "Generally speaking, a receiver by way of equitable execution will not be appointed over payments to be made in the

future, but only over payments which have already accrued due and which have not as yet been paid over to a defendant. See the decision in *Cleary v. O'Donnell* [1944] 78 ILTR. 190. In exceptional circumstances, however, this rule has been relaxed, and counsel for the plaintiff has referred me to the decision in *Orr v. Grierson* [1890] 28 L.R. Ir. 20, where a receiver by way of equitable execution was appointed over accruing gales of rent of a net head-rent for a limited number of years, estimated as sufficient to satisfy a judgment. "

12. Of some relevance to Mr O'Connor's submission are the further comments of O'Hanlon following the passage just quoted, since his submission includes one, by implication at least, that the applicant may be required to make disbursements from the damages award regarding costs and outlays. In that respect, O'Hanlon J. stated at p. 422 also:

> "That decision [*Orr v. Grierson*] was considered by the King's Bench Division in Ireland in the later case of *Cohen v. Ruddy* [1905] 2 I.R. 56 and distinguished, and the court declined to follow the decision in *Orr v. Grierson*…… in the circumstances of that case. The basis for the distinction drawn was the circumstance that in the later case a number of payments had to be made by the landowner out of the annual rent received by him. Fitzgibbon J. said:
>
> > 'It is not the practice of the King's Bench to appoint a plaintiff a receiver by way of equitable execution unless where it is proved that all the money that can come to his hands under the execution will be the money of the defendant.'
>
> In the present case, it appears prima facie that the monies payable in favour of the defendant by way of ground rents may not be subject to disbursements in favour of third parties (save that tax may be payable in respect of same to the Revenue Commissioners, whether deducted at source or payable by the recipient of same)."

13. Mr O'Connor has referred also to *Glanville: The Enforcement of Judgments* at p. 183 where the learned author refers to *Ahern v. O'Brien* [supra] and other cases for support for his statement that "generally speaking a receiver by way of equitable execution will not be appointed over payments to be made in the future …." . He refers also to *Holmes v. Millage* [1893] 1 QB 551 and states "the principle applying here is that the remedy cannot be used against an asset which was not exigible either at common law or in equity before the Judicature Acts, such as the debtor's future earnings."

14. Counsel for the second named Notice Party on the other hand submits that the Court may make an order over monies payable in the future, as was done in the circumstances of *Ahern v. O'Brien* [supra], and that the circumstances of the present case are such as to render it "just or convenient" to do so, since there is no doubt about the indebtedness of the applicant to the second named Notice Party, and that it has no control over the monies which the applicant may recover in damages, and cannot even be expected to know when that action may come on for hearing, so as to be able to make an appropriate and timely application by way of application for an order of garnishee when the amount is ascertained, or be in a position to execute an order of *fieri facias* in the normal way to recover the amount due.

15. It is submitted that the ordinary methods of execution in respect of the costs order are insufficient to enable execution to be an effective remedy, and that in these circumstances the Court, in exercise of its equitable jurisdiction, is empowered and should assist the second named Notice Party to recover the amount due by means of an order appointing a receiver by way of equitable execution, and that it is therefore "just or convenient" that an order be made, as permitted under the rule.

16. Counsel for the second named Notice Party has referred the Court an interesting judgment of Colman J. in *Soinco S.A.C.I. and another v. Novokuznetsk Aluminium Plant and others* [1988] 1 QB. 406, (hereafter referred to as "*Soinco*") in aid of his submission that the Court may indeed order such an appointment over sums not yet ascertained and payable in the future. Coleman J. held that since the Court had jurisdiction to grant an injunction to preserve for execution assets acquired after judgment, there was no reason why the Court could not appoint a receiver to preserve such assets, and to effect attachment of those assets for the benefit of the judgment creditor; and there was also jurisdiction to appoint a receiver by way of equitable execution to receive future debts as well as debts due or accruing at the date of the order. I will return to this important judgment in due course. But in passing I note that in *Courtney: Mareva Injunctions and Related Interlocutory Orders*, the learned author comments in relation to the reasoning of Colman J. in *Soinco* that "it is thought that the foregoing reasoning is both convincing and attractive and may be persuasive to an Irish Court."

17. Curiously, the 30th edition of *Snell's Equity*, published in 2000 and which states the law as of the 15th October 1999, makes no reference to the development of the law in this regard following the judgment in *Soinco*, though there is reference in a footnote to *Bourne v Colodense Ltd* [1985] I.C.R. 291 and to the fact that it was applied in *Maclaine Watson & Co. Ltd v. International Tin Council* [1988] Ch. 1, both being cases considered by Colman J. in *Soinco*.

18. The appointment of a Receiver by way of Equitable Execution can be seen as one of the many ways in which the equitable maxim 'Equity will not suffer a wrong to be without a remedy' was given practical effect. Prior to the establishment of the Courts of Chancery, it was often the case that under the Common Law many wrongs went unremedied. Nevertheless, even at equity it was not every moral wrong which was addressed, but only those rights which were capable of being enforced by an order of the court. In *Holmes v. Millage* [1893] 1 QB. 551 - a case often relied upon for the proposition that the Court will not appoint a receiver over sums of money to be received in the future by the judgment debtor – Lindley J. stated at p. 555:

> "It is an old mistake to suppose that, because there is no effectual remedy at law, there must be one in equity. But the mistake, though old and often pointed out, is sometimes inadvertently made even now. Courts of equity proceeded upon well known principles capable of great expansion; but the principles themselves must not be lost sight of."

14. In that case, the plaintiff sought to have a receiver appointed over the defendant's earnings from his employer in order to satisfy the judgment, and the Court found that since the common law writs of execution had never extended to the future earnings of a judgment debtor, neither could an equitable remedy. This was explained on the basis that courts of equity gave relief where a legal right existed and where there were legal difficulties which prevented the enforcement of that right at law. But the existence of a legal right was regarded as essential to the exercise of the equitable jurisdiction. The difficulty in that case was stated as follows by Lindley J. at p. 557:

> "It does not arise from any impediment which the old Court of Chancery had jurisdiction to remove. The difficulty arises from the fact that future earnings are not by law attachable by any process of execution direct or indirect."

15. By s. 28, sub-s.(8) of the Judicature Act (Ireland) 1877, the Court was empowered to appoint a receiver "in all cases in which it shall appear to the Court to be just or convenient that such order should be made…". Nevertheless that section was not to be

construed as giving an unrestrained power. As Davey LJ. stated in the context of the equivalent section in England, namely s. 25(8) of the Judicature Act, 1873:

> "[the words of the section] do not confer an arbitrary or unregulated discretion on the court, and do not authorise the court to invent new modes of enforcing judgments in substitution for the ordinary modes."

16. Order L, r. 27 of The Rules of the Supreme Court (Ireland) 1891 provided a rule governing applications for the appointment of a receiver by way of equitable execution, and thereunder the Court was required to consider whether it would be just or convenient to make the order. A footnote to that rule in Wylie's Judicature Acts at p.677 states that "in order to satisfy the Court in appointing a receiver under this rule, the circumstances must be such as would have enabled the Court of Chancery to make such an order before the Judicature Act". In other words, the section and the later rule did not create a new power or extend the old power. The power to appoint is not itself execution but rather an equitable relief in aid of execution, in circumstances where there is some obstacle or hindrance to legal execution. Where the normal methods of legal execution are sufficient, for example where there are goods of the judgment debtor which can be seized on foot of a writ of *fieri facias*, a receiver will not be appointed – see *National Irish Bank Ltd. V. Graham* [1994] 1 IR. 215.

17. Equally, the remedy was not available so as to capture monies which would not have been amenable to legal execution prior to the Judicature Acts, such as by sequestration, and it is notable that in cases such as *Holmes v. Millage* [supra] and *Re: Johnson* [1898] 2 IR. 551, the monies being targeted were in the nature of earnings to be earned in the future by the judgment debtor, and that the basis of those decisions was that such monies would not have been amenable for execution by way of sequestration, and therefore equitable relief was refused. But it is important to appreciate that the future monies were earnings on which the judgment debtors were reliant for their living requirements. That said, Colman J. in *Soinco*, rejected the submission of the plaintiffs that *Holmes v. Millage* could be "explained by the fact that the judgment debtor's interest was in future wages as distinct from the future *debts unrelated to a contract of employment*." (my emphasis) and stated:

> "The basis of the judgment was this: (1) receivers by way of equitable execution were not appointed prior to the Judicature Acts in respect of interests not capable of being subject to process of execution at law (save for one exception referred to which is immaterial to the present case (see [1893] 1 QB 551 at 555)); (2) future wages were not capable of being subject to process of execution at law and therefore could not be the subject matter of the appointment of a receiver by way of equitable execution; (3) the 1873 Act, s 25(8), did not permit the courts to abandon that basic requirement of availability of the interest for execution at law".

18. He appears to be making the point there that simply because the monies in that case were future wages did not mean by extension that future monies or debts of a different character could be the subject of an order appointing a receiver by way of equitable execution. That is not to say that they cannot be, but rather simply that *Holmes v. Millage* was not authority for that.

19. In *Soinco*, Colman J. reviewed many elderly authorities, and concluded following that review as follows at p. 416:

> "The result of these authorities is that, had this application been before me in the period between *Morgan v Hart* [1914] 2 KB 183 and the coming into force of the Supreme Court of Judicature (Consolidation) Act 1925, I should have been bound to refuse to appoint a receiver by way of equitable execution in respect of any payments which would, after the date of the order, become due or accruing due. That is because such future debts would not, when the order was made, have be amenable to execution by garnishee proceedings since such proceedings are inapplicable to future debts and because the Court of Chancery would not before 1873 give equitable relief to assist execution in a case where there was no property of a kind which could at the time be made subject to execution by legal process."

20. In his consideration of subsequent authority, Colman J. referred to, *inter alia*, the judgment of Donaldson MR in *Parker v. Camden London Borough Council* [1986] Ch. 162 who was faced with a submission that it was only open to the Court to appoint a receiver in circumstances in which the Court of Chancery would have done so prior to the Judicature Act coming into operation in 1873. In that regard he stated at p.173:

> 'For my part I do not accept that the pre-Judicature Act practices of the Court of Chancery or any other court still rule us from their graves. In any event that decision relates to equitable execution of a judgment and is not a matter with which we are concerned.'

21. He referred also to a passage from the judgment of Dillon LJ. in *Bourne v. Colodense Ltd* [1985] I.C.R. 291 at p. 302 as follows:

> "'The appointment of a receiver by way, as it is traditionally called, of equitable execution is a form of equitable relief to enforce payment of a judgment debt which the court may grant in the special circumstances of a particular case if, as in the present case, the recovery of the judgment debt by the more usual processes of execution or attachment of debts is not practicable. The remedy is, however, discretionary and it is plain that the court would not appoint a receiver if the court were satisfied that the appointment would be fruitless because there was nothing for the receiver to get in."

22. Finally, he considered the judgment of Millett J. in *Maclaine Watson & Co. Ltd v. International Tin Council* [1988] Ch. 1. wherein the view was expressed that there was no "technical objection" to the appointment of a receiver in circumstances where he had concluded that on the facts of that case the fund over which the receiver was being appointed would not have been amenable to an order of garnishee – in other words it was not one which would have been amenable to legal execution. As seen already, that fact would have been a bar to the equitable remedy being granted pre – Judicature Act.

23. In *Soinco*, the plaintiff's Counsel referred to modern developments in the area of preservation of assets, such as the so-called *Mareva* injunction, in order to ensure that at some future time they will b e available to a successful party who becomes a judgment creditor. He noted that such orders are not confined to assets of the company which exist at the time of making of the order but extend to assets brought into the jurisdiction after the order is made. If it were otherwise, he was of the view that much of the value of such an order would be destroyed.

24. Before setting out the reasoning and conclusions of Colman J., it is worth noting the judgment of Lord Denning MR in M*areva Compania Naviera S.A. v. International Bulkcarriers S.A.* [1975] 2 Lloyds Rep. 509 – a surprisingly short judgment given the significance which it has had in commercial and other litigation. Most *Mareva* injunctions are granted at a stage in proceedings long before judgment has even been obtained. It will of course be discharged if at the conclusion of the case the plaintiff has been unsuccessful. That feature is absent from the present case in which the second named Notice party has already obtained judgment for costs against the applicant and those have been taxed in the sum stated. In *Mareva*, Lord Denning referred to the existence of

old authority in the form of the judgment of Cotton LJ. in *Lister v. Stubbs* [1890] 45 Ch.D. 1 in which he stated:

> "I know of no case where, because it was highly probable that if the action were brought to a hearing the plaintiff could establish that a debt was due to him from the defendant, the defendant has been ordered to give security until that has been established by the judgment or decree."

25. Nevertheless, Lord Denning was of the view that s. 25(8) of the Judicature Act, 1875 gave a very wide power, so that it could not grant an injunction to protect a person who had no legal or equitable right whatever, and he referred to Halsbury's Laws of England, vol 21, 3rd. ed. p. 348 as follows:

> "… now, therefore, whenever a right, which can be asserted either at law or in equity, does exist, then, whatever the previous practice may have been, the Court is enabled by virtue of this provision, in a proper case, to grant an injunction to protect that right."

26. He concluded, albeit in a case where judgment had not been obtained:

> "In my opinion that principle applies to a creditor who has a right to be paid the debt owing to him, even before he has established his right by getting judgment for it. If it appears that the debt is due and owing – and there is a danger that the debtor may dispose of his assets so as to defeat it before judgment – the Court has jurisdiction in a proper case to grant an interlocutory judgment so as to prevent him disposing of those assets…..the plaintiffs should be protected… it is only just and right that this Court should grant an injunction".

27. As I have already referred to, Colman J. concluded in *Soinco* that he was not precluded by prior authority from granting an order. His reasoning appears at p. 422 as follows:

> "If pre-trial *Mareva* injunctions can apply as, in my judgment, they do, to assets brought into the jurisdiction subsequently to the making of the order, there can be no reason, in principle, why post-judgment conservatory injunctions should not also be capable of applying to after-acquired assets, provided that they are within the overall monetary ceiling incorporated in the order. If that is correct, and there is a jurisdiction to preserve for execution by injunction assets acquired and yet to be acquired after judgment, there would seem equally to be no reason in principle why a receiver should not also be appointed to preserve such assets. And if a receiver may be appointed to preserve such assets, why not to effect attachment of those assets for the benefit of the judgment creditor, provided that the court is satisfied that the debtor can be adequately protected against double jeopardy? In these circumstances I can see no reason whatever why, 124 years after the Judicature Acts, the court should deny to itself a jurisdiction which is self-evidently likely to be extremely useful as an ancillary form of execution. I would therefore hold that there is jurisdiction to appoint a receiver by way of equitable execution to receive future debts as well as debts due or accruing due at the date of the order."

28. At p.420 the learned judge stated:

> "I therefore approach the issue as to the availability of receivers by way of equitable execution on the basis that in at least one case, *Bourne v Cobdense Ltd*, the Court of Appeal has in recent times been prepared to make such an appointment in respect of property not amenable to execution by legal process, albeit that case was not concerned with future debts. Is it therefore justifiable to extend the availability of the remedy to future debts? Once it is accepted that availability of the property for execution by legal process is not a precondition to the appointment of a receiver by way of equitable execution, the question that has to be answered is whether future debts have intrinsic characteristics which would justify excluding them from this remedy. In approaching this question it is necessary to keep in mind that the purpose of such a remedy would be to supplement legal process of execution by garnishee proceedings. Since that process does not apply to future debts and since it cannot be commenced in anticipation of debts becoming accruing due at a later stage, there is much to be said for the availability of a remedy which would enable the judgment creditor to acquire information as to future debts to enable him to effect collection from third parties as and when they fell due."

29. In the present case, the second named Notice Party has judgment and it remains unsatisfied. The applicant, the judgment debtor, has at present no means of discharging her liability, but has instituted proceedings for damages which may in the future yield a fund which may not be sufficient to discharge the entire of the judgment. However, since those proceedings have been instituted in the High Court it is fair to assume that she is hopeful that an award in excess of the Circuit Court jurisdiction may be awarded. In my view this Court, in considering whether it is just or convenient to make the order sought should not be unduly influenced by the submission by the applicant that the making of such an order may enable the defendant in her proceedings to "thwart justice" if she is not able to continue with her case to trial. That is not a consideration which should prevent the second named Notice Party from relief it would otherwise be entitled to. The applicant may well be able to pursue the case even with the order in place. I accept of course that her appetite for pursuing the case may be dulled, perhaps completely, if success in her case will yield no benefit to her other than the fact that at least part of her legal obligations to the Notice Party will be discharged. But again that is not something which should be determinative either.

30. Neither is the fact that the applicant has put forward a proposal for an undertaking whereby she will agree that 75% of any award should be paid to the Notice Party. That Party is not obliged to accept such a proposal.

31. The sum of damages is not to be in any way equated with earnings or wages necessary for the applicant to live. It is a fund entirely removed from such a category. It is in the nature of a debt due for payment in the future in the event of an award of damages being made in her favour.

32. I am satisfied that the ordinary processes of execution normally available to a judgment creditor are not in the circumstances of the present case sufficient to enable the second named Notice Party enforce payment of its judgment against the applicant. I am satisfied that the reasoning of Colman J. in *Soinco* is equally persuasive in this jurisdiction, and I see no reason why this Court should conclude that the law here should be different. The appointment of a receiver by way of equitable execution is a remedy by which equity assists a judgment creditor to secure enforcement of a judgment against the judgment creditor. To appoint such a receiver over such sum as may be recovered by the applicant in her claim for damages, and limited of course to the amount of the judgment debt, including interest, does not do any injustice to the judgment debtor, especially in circumstances where judgment ahs already been obtained. It is not therefore unjust. I am satisfied that it is convenient to do so, given the inability of the ordinary methods of execution to effect a discharge of the amount due, and given the fact, which I accept, that the second named Notice Party can have no control over the applicant's proceedings for damages and no reasonable way of ensuring that it is aware of what is happening

in relation to those proceedings even if there are not settled prior to any hearing. The second named Notice Party would never aware if the case was settled prior to trial, and in a position to make any timely application for an order of garnishee over any settlement monies. Neither would it be aware of the date of any trial so as to hold a watching brief and make an appropriate application at the conclusion of the trial. It is therefore convenient that an order should be made.

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

34. The terms of the order which I will make will address in so far as possible the concern raised by the applicant as to the effect on her capacity to pursue her claim for damages.

35. In the present case, I am satisfied that a receiver should be appointed, and therefore order that Mr Jim Gilligan, Accountant, of Gilligan & Co, be appointed over so much of any sum payable to the applicant on foot of any settlement of her claim for damages, or on foot of any award of damages made by the Court, in proceedings entitled: The High court, Record Number 2004 No.12867P Between Colette O'Connell, plaintiff and Maurice Troy, as may be required to satisfy either in whole or in part the judgment for costs in the within proceedings made on the 31st July 2003, including interest thereon to date of payment, but excluding any sum either agreed in respect of costs of her claim for damages or as may be taxed in default of agreement on a party and party basis.