THE HIGH COURT

COMMERCIAL

[2016 No. 1920 S.]

BETWEEN

ALLIED IRISH BANKS PLC

PLAINTIFF

AND

SEAMUS MCQUAID AND BY ORDER DATED 30TH MAY, 2017, BEN GILROY AND CHARLES MCGUINNESS

DEFENDANTS

RULING of Mr. Justice Brian McGovern delivered on the 16th day of March, 2018

1. By order of the High Court (Haughton J.) dated 2nd February, 2017, the plaintiff obtained judgment against the first named defendant in the sum of €3,256,217.49 together with interest. The court placed a stay on the execution of the judgment for a period of twelve months. However, by order of the High Court (Haughton J.) dated 28th April, 2017, the stay was lifted in circumstances where the first named defendant declined to furnish undertakings as sought by the bank.

2. Since that time, the plaintiff bank has been attempting to levy execution in respect of the said judgment and to date has recovered no monies from the first named defendant. The second and third named defendants were joined on the basis that they were interfering with the process of execution and were assisting the first defendant to put his assets beyond the reach of the judgment creditors. The matters that arise for consideration in this ruling do not concern the second and third named defendants. In the course of a hearing before this Court on 9th March, 2018, dealing with costs and some other issues, the solicitor for the first named defendant sought an order setting aside the appointment of Ms. Claire Callanan, Solicitor, as receiver by way of equitable execution over certain bank accounts in the name of the first defendant.

3. The first defendant relies on the judgment of Barrett J. in *AIB v. McGuigan & Ors* [2018] IEHC 67. In the course of that judgment, the learned judge made some observations on the process of appointing a receiver by way of equitable execution and how O. 45, r. 9 of the Rules of the Superior Courts should be interpreted. At para. 14 of his judgment, he stated:-

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

4. The first defendant's solicitor drew the court's attention to the Civil Procedure Rules in England and Wales which require written evidence in support of an application to appoint a receiver. In England and Wales, the evidence required is:-

> (a) the judgment which the applicant is seeking to enforce;
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> (b) the extent to which the debtor has failed to comply with the judgment;
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> (c) the result of any steps already taken to enforce the judgment; and
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> (d) why the judgment cannot be enforced by any other methods.

5. While O. 45, r. 9 of the Rules of the Superior Courts does not specify that an applicant should nominate an individual who is proposed to act as receiver, a name would usually be proffered. This would generally be accompanied by an affidavit of suitability from someone who knows the proposed receiver and would also include a written consent signed by the nominee.

6. In this case, Ms. Claire Callanan was appointed as receiver by way of equitable execution at an *ex parte* hearing. The *ex parte* docket dated 7th February, 2018, seeks conditional orders of garnishee and injunctive relief requiring the first named defendant to take certain steps and provide certain information with regard to assisting the execution process. The *ex parte* docket did not include an application for the appointment of a receiver.

7. The application to appoint a receiver arose on an *ad hoc* basis when counsel for the plaintiff requested the court to appoint Ms. Callanan as receiver by way of equitable execution. The application was grounded on an affidavit of Mr. Phillip Butler sworn on 1st February, 2018, used in support of the application for conditional orders of garnishee and injunctive relief.

8. I am satisfied that the affidavit fulfilled the relevant criteria for the appointment of a receiver in that it referred to the judgment sought to be enforced and the extent to which the debtor has failed to comply with the judgment. The court was, in any event, more than familiar with the difficulties the plaintiff had in recovering on foot of the judgment in this case as there had been many applications brought before the court in aid of the execution process and there was ample evidence to show that the first defendant had failed to comply with the judgment and had taken steps, with the assistance of the second and third named defendants, to put assets beyond the reach of the judgment creditor. Sufficient evidence of steps already taken to enforce the judgment were given to the court which demonstrated that judgment could not be enforced without orders which included the appointment of a receiver by way of equitable execution.

9. When the application was made to appoint the receiver, there was no affidavit of suitability or written consent signed by Ms. Callanan to signal her agreement to act as receiver if appointed. However, O. 45, r. 9 does not provide that these steps be taken although it is the general practice.

10. Order 124 of the RSC deals with the effect of non-compliance with the rules and provides, *inter alia*, that non-compliance with the rules shall not render any proceedings void unless the court shall so direct:-

> *"…but such proceedings may be set aside either wholly or in part as irregular, or amended, or otherwise dealt with in such matter and upon such terms as the court shall think fit."*

11. Order 124, rule 3 provides:-

> *"Where an application is made to set aside proceedings for irregularity, the several objections intended to be insisted upon shall be stated in the notice of motion."*

12. There was no notice of motion to vacate the appointment of the receiver in this case, but I proceeded to hear the application made on behalf of the first named defendant on the basis that the plaintiff was not prejudiced and was in a position to deal with the matter. The court has an inherent jurisdiction to order its own procedures and to deal with matters in a way which efficiently uses court time and resources. There would have been little point in adjourning the hearing so that the first defendant could bring a formal motion which would have to be heard on another date in circumstances where there was no prejudice to the plaintiff by dealing with the matter as it arose.

13. The appointment of a receiver by way of equitable execution does amount to the exercise of a power which has a significant impact on a debtor in that it removes those funds from his control. The court should always be satisfied that it is necessary to appoint a receiver and should also ensure that the person so appointed is suitable to exercise their considerable powers over the assets of the debtor.

14. In this case, there was no question but that the appointment of a receiver was necessary and the only deficiency in the procedure appears to relate to the fact that at an ex parte hearing, an appointment was made without an affidavit of fitness or a consent to act being produced in the normal way. Furthermore, there was no evidence as to the probable costs of her appointment. Equally, the first named defendant did not comply with the formal requirements of O. 124, r. 3 and the order of this Court made on 7th February, 2018, at paragraph 18.

15. So far as the consent was concerned, Ms. Callanan was in court instructing counsel when the application was made and the court is entitled to assume that if counsel made the application for her appointment that she was consenting to the appointment. As to her suitability, Ms. Callanan is a solicitor and an officer of the court and is familiar with the financial details of this case and on that basis is, *prima facie*, a suitable person to act. In the circumstances of this case, the failure to put an affidavit of fitness before the court is not, in my view, of material significance.

16. The first defendant has not sought to challenge the suitability of Ms. Callanan to act as receiver but rather relies on technical deficiencies in her appointment in claiming that the court did not have sufficient information on which to make the appointment and also on the basis of the absence of an affidavit of suitability and a written consent to act signed by Ms. Callanan, and furthermore on the basis that there was no evidence of the probable costs of her appointment.

17. In making the order on 7th February, 2018, the court directed that the receiver shall not act in execution in respect of the monies described in the order for a period of fourteen days from the date of the order and the court granted to the first named defendant or any third party affected by the making of the order liberty to apply to the court on no less than 48 hours notice to the plaintiff to discharge the order.

18. While the first defendant raises a technical point with regard to the appointment of the receiver, he did not comply with the order in giving not less than 48 hours notice to the plaintiff of his application to discharge the order. If the application was based on the unsuitability of Ms. Callanan to act as receiver, I am satisfied it would be necessary to conduct a hearing on that point. However, the objections raised were of a technical nature concerning three issues namely; (i) the absence of an affidavit of suitability; (ii) the absence of a consent to act as receiver signed by Ms. Callanan; and (iii) the absence of any evidence as to the probable cost of her appointment. I do not regard items (i) and (ii) as being significant in the context of the particular facts of this case.

19. So far as item (iii) is concerned, there is no doubt that O. 45, r. 9 specifies that matter as something which the court *"…shall have regard to…"*. There is also a proviso that the court may *"if it shall so think fit, direct any inquiries on these or other matters before making the appointment"*. The "*other matters*" referred to in the rule are the amount of the debt and the amount which may probably be obtained by the receiver. I am satisfied that those matters were adequately canvassed in the affidavit of Mr. Phillip Butler already referred to para. 7 of this ruling.

20. In my experience, it is by no means a universal practice in applications to appoint a receiver by way of equitable execution for detailed evidence to be given as to the probable costs of the appointment. The rule does not specify that such evidence has to be given but that the court shall have regard to the probable costs of the appointment and this is something which, in many cases, is possible from the surrounding facts. In the present case, Ms. Callanan is the solicitor having carriage of the case and is familiar with all the relevant details including the financial information which has been gathered in respect of the first named defendant. In my view, O. 45, r. 9 is not to be interpreted as meaning that the court should have an estimate of the costs of the receiver before it can appoint a receiver. As I interpret the rule, it seems to provide for the courts being required to take the "*probable costs*" into account and if there is any concern that these costs may be disproportionate in some way to direct a further inquiry. No evidence has been offered to the court by the first named defendant to suggest that the probable costs associated with the appointment of Ms. Callanan as a receiver would warrant further investigation or be a cause for concern as being outside the norm for such an appointment. I have had regard to the probable costs of her appointment insofar as I consider that her existing involvement and knowledge of the facts of this case is likely to assist in the efficiency of any receivership and, thereby, keeps the costs at a reasonable level.

21. In the particular circumstances of this case, I do not find that the objections raised constitute a good reason for setting aside the order. I emphasise that my ruling is specific to the facts of this case. I would, however, observe that as a general rule, it is desirable that when an application is brought to appoint a receiver by way of equitable execution, it should be on the basis of the criteria set out above and should include an affidavit of suitability and a written consent signed by the nominee.

22. I make no order discharging the receiver in this particular case.